(5)

No. _____

In the

Supreme Court of the United States

Melvin T. Smith,

petitioner

v.

Commonwealth of Massachusetts,

respondent

Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

Counsel of Record for Petitioner:

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Questions Presented

1. Should this Court grant certiorari to directly review Smith's case and decide the question that, constrained by the habeas corpus standard of review, it did not reach in the recent case of Price v. Vincent?[1] That is, whether the double jeopardy clause's prohibition against successive prosecutions is violated where the judge unequivocally rules that the defendant is not guilty because the government's evidence is insufficient but later reverses her finding of not guilty?

2. There is a split of opinion among the United States Courts of Appeals and among the state courts on the question of whether, in similar situations, trial judges violate the double jeopardy protection against successive prosecution by withdrawing an already-granted verdict of not guilty. Should this Court grant certiorari to clarify its jurisprudence?

[1] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).

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No. _____

In the

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Melvin T. Smith,

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Commonwealth of Massachusetts,

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Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

Petitioner Melvin Smith respectfully prays that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court.

Citations to the Opinions Below

The opinion of the Massachusetts Superior Court granting and then denying Smith's motion for a required finding of not guilty is unpublished. The opinion of the Massachusetts Superior Court denying Smith's motion for a new trial is unpublished. The opinion of the Massachusetts Appeals Court affirming Smith's conviction of unlawful possession of a firearm over double jeopardy and vagueness challenges is reported as Commonwealth v. Smith, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003). The order of the Massachusetts Supreme Judicial Court denying further appellate review is published at Commonwealth v. Smith, 440 Mass. 1104, 797 N.E.2d 380 (2003). Copies of the opinions below appear in the appendix to the this petition at App. 1a-23a.

Statement of Jurisdiction

The Massachusetts Supreme Judicial Court issued its order denying review of Smith's conviction on October 3, 2003. Neither party petitioned that court for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional and Statutory Provisions Involved In This Case

1. The Fifth Amendment to the United States Constitution provides:

> No person shall held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. Massachusetts General Laws, Chapter 269, § 10 provides, in part:

> (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
>
> (1) being present in or on his residence or place of business; or
>
> (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
>
> (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
>
> (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
>
> . . . shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. . . .
>
> (b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger, [etc.] . . . shall be punished. . . .

(c) Whoever, except as provided by law, possesses a machine gun . . . without permission under section one hundred and thirty-one of said chapter one hundred and forty . . . shall be punished by imprisonment in the state prison for life, or for any term of years. . . .

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any p rson so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

4. Massachusetts Rule of Criminal Procedure 25 provides, in part:
Motion For Required Finding Of Not Guilty
(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.

Concise Statement of the Case

Petitioner Melvin Smith was charged with unlawful possession of a firearm (fourth offense), assault and battery with a dangerous weapon, and armed assault with intent to murder. On November 12, 1998, a Justice Elizabeth Donovan of the Massachusetts Superior Court allowed Smith's motion for a required finding of not guilty[2] of the charge of unlawful possession of a firearm.[3] Smith's counsel successfully argued that the government failed to introduce any evidence as to the whether the firearm met the Massachusetts statute's requirement that the barrel length be shorter than sixteen inches.[4] Finding that the government produced "not scintilla of evidence" as to barrel length, the court entered a required finding of not guilty.[5] The finding was not communicated to the jury, but it was recorded on the docket.[6] Specifically, the court endorsed the motion for a required finding of not guilty as follows:[7]

11/12/98 - Filed and after hearing.
Allowed
Donovan, J
Attest: Elizabeth Brady
Assistant Clerk

The court immediately denied the prosecutor's motion to reopen the evidence.[8] After the required finding of not guilty entered as to the firearm charge, Smith and co-defendant Brown presented their cases, rested, and argued for their requested jury

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[2] Mass. R. Crim. P. 25(a).
[3] The transcript of the trial will be cited, by volume and page, as "(Tr. [volume]:[page])."; (Tr. 6:67).
[4] (Tr. 6:62-65); M.G.L. c. 269, § 10(a); M.G.L. c. 140, § 121.
[5] (Tr. 6:65).
[6] App. 3a.
[7] App. 10a.

instructions.[9] *After* those further substantive proceedings, the court reversed the finding of not guilty.[10] Upon learning that the court had "reinstated" the firearm indictment, Smith's counsel attempted to argue additional grounds in support of the motion but the court refused to hear further argument.[11]

At the close of jury deliberations, Smith was convicted of unlawful possession of a firearm, assault and battery with a dangerous weapon and armed assault with intent to murder.[12] The jury acquitted Smith's codefendant, Felicia Brown, of being an accessory after the fact.[13]

Immediately following the jury's verdict the court proceeded to a jury-waived trial on that portion of the firearm indictment that charged Smith with a fourth offense.[14] After that trial, Smith was convicted of a fourth offense of unlawful possession of a firearm.[15] Smith was then sentenced to concurrent terms of ten to twelve years on the firearm indictment, nine to ten years on the assault and battery by means of a dangerous weapon indictment, and twelve to fifteen years on the assault with intent to murder indictment.[16] He appealed.

Smith then filed a motion for a new trial in the Superior Court, claiming that the withdrawal of the finding of not guilty subjected him to successive prosecutions. In its memorandum denying the motion for a new trial, the trial court expressly found that "the court allowed Smith's motion for a required

[8] (Tr. 6:66-67).
[9] (Tr. 6:67-104, 106-119).
[10] (Tr. 6:119-24).
[11] (Tr. 6:124-25).
[12] (Tr. 8:13-16).
[13] (Tr. 8:16).
[14] (Tr. 8:17, 19-24).
[15] (Tr. 8:83), M.G.L. c. 269, § 10 (d).
[16] (Tr. 8:96).

finding of not guilty on the firearms charge" and only withdrew the allowance *after* Smith rested his case.[17] But the trial court denied relief, ruling that the withdrawal of the finding of not guilty did not violate double jeopardy only because "Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed."[18] Smith appealed.

The Massachusetts Appeals Court denied Smith's appeal in Commonwealth v. Smith.[19] The Commonwealth argued that the ruling was interlocutory and reconsideration was permissible. But, like the trial court, the Appeals Court rested its decision solely on the ground: that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding" nor did it "'subject[] him to a second trial before a second trier of fact.'"[20]

State proceedings ended on October 3, 2003 when the Massachusetts Supreme Judicial Court denied Smith's application for leave to obtain further appellate review.[21]

[17] App. 17a.
[18] App. 20a.
[19] App 1a-9a.
[20] App. 3a (quoting United States v. Wilson, 420 U.S. 332, 345 (1975)).
[21] App. 23a.

Reasons for Granting the Petition

I. The trial court withdrew its acquittal of Smith on the firearms charge after he presented his case and requested jury instructions. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime. Smith's conviction cannot stand.

A. Smith's case is well-suited for certiorari review.

Hard cases, and particularly hard facts, make bad law. Those kinds of cases do not suit this Court's function of clearly declaring the fundamental law of this nation. That is precisely what prevented this Court from deciding in May, 2003 the double jeopardy issue presented here. At that time, the Court considered the more factually and procedurally complicated case of Price v. Vincent.[22] On the other hand, Smith's case is particularly well-suited for certiorari review.

The facts complicated Vincent because the trial court's ruling directing a verdict for the defendant was tentative[23] and because no other proceedings occurred before the court reconsidered its ruling.[24] The habeas corpus standard of review[25] complicated Vincent because the defendant had to show that the state court's rejection of his claim was not only wrong on the merits but also objectively unreasonable.[26]

Smith's case uncomplicatedly presents the issue that evaded the Court in Vincent. Factually, the Massachusetts courts all agreed that the trial court in fact granted Smith's motion for a required finding of not guilty.[27] And there is no

[22] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).
[23] Vincent, 123 S. Ct. at 1854.
[24] Vincent, 123 S. Ct. at 1851.
[25] 28 U.S.C. § 2254(d)(1).
[26] Vincent, 123 S. Ct. at 1854-55.
[27] App. 2a, 20a.

dispute that the trial court withdrew the finding of not guilty only after Smith presented his case, rested, and argued his requests for jury instructions.[28] Procedurally, this Court would be unconstrained by the habeas corpus standard of review. It would be free to declare what the Constitution requires, rather than struggling with the question of whether other courts were unreasonably wrong. Thus, this Court is well-positioned to rule whether the double jeopardy clause permits a trial judge to withdraw a finding of not guilty solely because the jury remained intact to hear evidence against the defendant on other charges.

B. The trial court violated Smith's right not to be placed in jeopardy twice.

Jeopardy terminated as to the firearm indictment when the court allowed Smith's motion for a required finding of not guilty; further proceedings violated the prohibition against double jeopardy.[29] But the Massachusetts Appeals Court ruled that the Constitution was not violated because "the judge's correction of her ruling did not require a second proceeding" before a second trier of fact.[30] That is, the judge's finding of not guilty meant nothing for purposes of double jeopardy because the jury remained in the box. When this view was advanced by the United States as *amicus curiae* in Vincent, at least one Justice of this Court characterized the argument as "extraordinary."[31]

Indeed, one would have thought that this Court's decisions in United States v. Martin Linen and Smalis v. Pennsylvania settled the matter. In Martin

[28] App. 2a, 17a.
[29] United States v. Martin Linen, 430 U.S. 564, 571 (1977); Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986).
[30] App. 3a.

Linen, this Court declared that there is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause."[32] Thus, the judge's reconsideration of her acquittal of Smith was just as impermissible as "reconsideration" of a jury's acquittal. If the matter needed to be any clearer, Smalis holds that "*whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.*"[33] Here, the trial judge unquestionably acquitted Smith. That acquittal is no less final, no less determinative of the issues than a jury's verdict.[34]

Nevertheless and quite unfortunately, the Massachusetts courts, some federal Courts of Appeals, and some state courts have now muddied the waters. But the cases relied upon by the Massachusetts courts (and other courts) all derive from United States v. LoRusso.[35] A proper reading of LoRusso shows that it does not even support the Massachusetts Appeals Court's position. There, no double jeopardy violation occurred because the government was allowed to proceed on a lesser included offense after the motion for acquittal had been allowed only on the primary offense.[36] This unremarkable procedure is fundamentally different than reconsidering the acquittal on the primary offense.[37]

[31] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).
[32] Martin Linen, 430 U.S. at 573.
[33] Smalis, 476 U.S. at 145 (emphasis added).
[34] Arizona v. Rumsey, 467 U.S. 203, 210-212 (1984).
[35] United States v. LoRusso, 695 F.2d 45, cert. denied sub nom Errante v. United States, 460 U.S. 1070 (1983).
[36] LoRusso, 695 F.2d at 52.
[37] United States v. Baggett, 251 F.3d 1087, 1098 (6th Cir. 2001) (Aldrich, J. dissenting).

The Massachusetts Appeals Court[38] and the United States in Vincent went wrong by mangling this Court's holding in United States v. Wilson.[39] Wilson holds that double jeopardy is not violated by a government appeal after a jury convicts the defendant but the judge later orders an acquittal.[40] But where the first factual resolution of the case resulted in acquittal, then jeopardy has terminated and further proceedings of any type are barred.[41] Here, Smith was first acquitted and then unconstitutionally subjected to further factfinding resulting in conviction.

Finally, although prejudice is irrelevant to double jeopardy claims, the withdrawal of Smith's acquittal after the close of evidence and after the charge conference,[42] deprived Smith of important advocative opportunities. He lost the opportunity to argue additional grounds for his motion for a required finding of not guilty as well as the opportunity to argue requests for jury instructions regarding the firearms charge.[43]

II. This Court's jurisprudence sets clear guideposts for consideration of double jeopardy claims where an acquittal is reversed by the trial judge. But the decisions of state courts as well as federal courts have significantly muddied the waters, employing divergent analyses and reaching divergent results. This Court must resolve the conflict between the lower courts.

The Court well knows that the lower courts take numerous inconsistent positions on the issue at the bar. The matter was fully briefed but not reached in

[38] App. 3a.
[39] United States v. Wilson, 420 U.S. 332 (1975).
[40] Wilson, 420 U.S. at 344-45 (1975).
[41] Fong Foo v. United States, 369 U.S. 141 (1962); Smalis, 476 U.S. 140, 145 (1986).
[42] (Tr. 6:119).
[43] Herring v. New York, 422 U.S. 853, 862 (1975).

Vincent.[44] Nevertheless, Smith will briefly recapitulate the split among the courts. Those courts that find a double jeopardy violation generally focus on the fact that, after the grant of the acquittal, there were further proceedings before the acquittal was withdrawn.[45] Others focus on the fact that the trial court's order was final rather than tentative.[46]

Those courts that reject the double jeopardy claim generally find no violation because no further substantive proceedings ensued before the acquittal was withdrawn.[47] Others rest on a holding that the ruling on the directed verdict was only tentative or was unclear.[48] The remarkable position accepted by the Massachusetts Appeals Court, if allowed to stand is fundamentally at war with this Court's decision in Smalis. To Smith's knowledge, only two other courts have accepted this massively flawed view.[49]

This Court must grant certiorari to resolve the wide disparity of authority interpreting the meaning of the prohibition against double jeopardy. Unfortunately, the Court's decision in Vincent did not resolve the "tremendous amount of uncertainty" in the lower courts because the Vincent Court could only

[44] See Vincent, 123 S. Ct. at 1854 n.2.
[45] See United States v. Blount, 34 F.3d 865, 868-869 (9th Cir. 1994); State v. Millanes, 885 P.2d 106, 109-111 (Ariz. Ct. App. 1994); Brooks v. State, 827 S.W.2d 119, 121-123 (Ark. 1992); Penn v. State, 945 S.W.2d 397 (Ark. Ct. App. 1997); Caldwell v. State, 803 So.2d 839, 841 (Fla. Dist. Ct. App. 2001); People v. Strong, 472 N.E.2d 1152 (Ill. App. Ct. 1984); People v. Henry, 769 N.E.2d 34, 41-44 (Ill. App. Ct. 2001); Lowe v. State, 744 P.2d 856, 856-858 (Kan. 1987); Barnes v. State, 9 S.W.3d 646, 647-651 (Mo. Ct. App. 1999); State v. Blacknall, 672 A.2d 1170, 1173-76 (N.J. Super. App. Div. 1995).
[46] Blount, 34 F.3d at 868-869.
[47] State v. Sperry, 945 P.2d 546, 552 (Or. Ct. App. 1997); United States v. Washington, 48 F.3d 73, 79 (2d Cir. 1995), cert. denied, 515 U.S. 1151 (1995); United States v. Rahman, 189 F.3d 88, 133 (2nd Cir. 1998), cert. denied, 528 U.S. 1094 (2000); United States v. Byrne, 203 F.3d 671, 671 (9th Cir. 2001).
[48] United States v. Byrne, 203 F.3d 671, 674 (9th Cir. 2001); United States v. Baggett, 251 F.3d 1087, 1094 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002).

declare whether the decision below was unreasonably wrong.[50] But it is emphatically this Court's role "to say what the law is."[51] Where, as here, this Court is free to do so, the writ must issue.

Conclusion

This Court should grant the defendant's petition for a writ of certiorari.

Respectfully submitted,

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Date: December 31, 2003

[49] State v. Iovino, 524 A.2d 556, 557-560 (R.I. 1987); In the Matter of Lionel F., 558 N.E.2d 30 (N.Y.), cert. denied, 498 U.S. 923 (1990),
[50] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 20 (visited December 29, 2003).
[51] Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)

COMMONWEALTH vs. MELVIN T. SMITH.

No. 00-P-1215

APPEALS COURT OF MASSACHUSETTS

58 Mass. App. Ct. 166; 788 N.E.2d 977; 2003 Mass. App. LEXIS 578

October 16, 2002, Argued

May 21, 2003, Decided

SUBSEQUENT HISTORY:
[***1] As Corrected July 10, 2003.

PRIOR HISTORY:
Suffolk. Indictments found and returned in the Superior Court Department on September 26, 1996, and October 8, 1998. The cases were tried before Elizabeth B. Donovan, J., and a motion for a new trial, filed on February 14, 2001, was heard by her.

DISPOSITION:
Judgments affirmed; order denying motion for a new trial affirmed.

COUNSEL:
David J. Nathanson, Committee for Public Counsel Services, for the defendant.

Joseph M. Ditkoff, Assistant District Attorney, for the Commonwealth.

JUDGES:
Present: Cypher, Smith, & Grasso, JJ.

OPINIONBY:
CYPHER

OPINION:

[**980] [*167] CYPHER, J. The defendant, Melvin T. Smith, appeals from his convictions for assault with intent to murder, *G. L. c. 265, § 18*, assault and battery by means of a dangerous weapon, *G. L. c. 265, § 15A*, and unlawful possession of a firearm, fourth offense, *G. L. c. 269, § 10*. The defendant also appeals from the denial of his motion for a new trial.

1. Factual background. A jury could have found the following facts. Codefendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston. n1 The [***2] Brown family occupied part of the second floor of the building and all of [*168] the third floor, and rented part of the second floor and all of the first floor to tenants. n2

n1 Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with the defendant on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown, 55 Mass. App. Ct. 440, 771 N.E.2d 214 (2002)*.

n2 Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.

On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and [**981] smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw [***3] Brown and the defendant in Brown's bedroom. The defendant was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, the defendant shot him three times. The defendant said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." n3

n3 Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.

Brown and the defendant left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson replied, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked Robinson [***4] how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of the defendant from a photographic array and identified the defendant as the person who shot him. At trial, Robinson identified the defendant as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and the defendant had left because Robinson had been [*169] acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, the defendant was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and the defendant drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and the defendant went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a [***5] motive and an opportunity to shoot him.

2. Discussion. a. The motion for required finding of not guilty and double jeopardy. After the Commonwealth rested, the defendant moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.

Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza, 372 Mass. 667, 670, 363 N.E.2d 673 (1977)*, in which the Supreme Judicial Court held that testimony that

a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the Latimore n4 **[**982]** standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury **[***6]** could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

n4 *Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979).*

The defendant argues that the judge erred because once the motion for a required finding was allowed, jeopardy terminated as to that charge, and the decision cannot be reversed regardless **[*170]** of whether the judge was factually or legally in error in allowing the motion. The Commonwealth responds that because the charge was submitted to the same jury that had heard the evidence, the defendant was not subjected to double jeopardy.

Massachusetts common law and the *Fifth Amendment to the United States Constitution* protect criminal defendants from being placed twice in jeopardy in three circumstances: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after **[***7]** conviction; and (3) multiple punishments for the same offense. See *North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); Luk v. Commonwealth, 421 Mass. 415, 419, 658 N.E.2d 664 (1995).* The defendant's argument implicates only the first circumstance, a second prosecution after acquittal. See *Commonwealth v. Lowder, 432 Mass. 92, 103, 731 N.E.2d 510 (2000).*

We conclude that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding. See, e.g., *Commonwealth v. Haskell, 438 Mass. 790, 792, 784 N.E.2d 625 (2003)* (judge's power to reconsider his or her own decisions during pendency of case is firmly rooted in common law); *United States v. Washington, 48 F.3d 73, 79 (2d Cir.)*, cert. denied, *515 U.S. 1151, 132 L. Ed. 2d 843, 115 S. Ct. 2596 (1995)* (trial judge properly reversed entry of acquittal, after defense case began, where judge did so before informing jury); *United States v. Baggett, 251 F.3d 1087, 1095 (6th Cir. 2001)*, cert. denied, *534 U.S. 1167, 152 L. Ed. 2d 126, 122 S. Ct. 1184 (2002)* **[***8]** (conviction upheld where trial court entered acquittal but then submitted charge to jury because such reversal did not require retrial). See also *Price vs. Vincent, U.S. Supreme Court, 155 L. Ed. 2d 877, 123 S. Ct. 1848, 2003 U.S. LEXIS 3678,No. 02-524, slip op. at 6-8 (U.S. May 19, 2003)* (reasonable for State court to conclude that judge's comments were not sufficiently final to terminate jeopardy). Furthermore, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson, 420 U.S. 332, 345, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975).*

The defendant also argues that the correction was improper under Mass.R.Crim.P. 25(a), *378 Mass. 896 (1979),* because the rule requires that the judge decide a motion made at the close of the Commonwealth's evidence at the time the motion is **[*171]** made. n5 The requirement of a prompt ruling "protects a defendant's right to insist that the Commonwealth present proof of every element of the crime with which he is charged before he **[**983]** decides whether to rest or to introduce proof in a contradiction or exoneration." *Commonwealth v. Cote, 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282 (1983).* **[***9]** This protection was honored. The defendant has not suggested that the initial allowance of the

motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case.

n5 Rule 25(a) of the Massachusetts Rules of Criminal Procedure provides, "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time" (emphasis added).

Additionally, the defendant has not indicated how the requirement precludes a judge from correcting a ruling. Compare *Commonwealth v. Rice, 216 Mass. 480, 482-83, 104 N.E. 347 (1914)* (no violation of double jeopardy protections by District Court judge's withdrawal of finding of guilt and declination of jurisdiction because case had not been ended at time judge withdrew guilty finding); *Fine v. Commonwealth, 312 Mass. 252, 258, 44 N.E.2d 659 (1942)* **[***10]** (judge has power to alter or amend his decision on motion for new trial at any time during pendency of proceedings before him).

Furthermore, the evidence was not insufficient as matter of law. Compare *Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127 (1983)* (no violation of right not to be put twice in jeopardy where judge indicated he would allow motion for required finding of not guilty but then permitted Commonwealth to reopen its case and enter stipulation into evidence). Contrast *Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 779, 756 N.E.2d 29 (2001)* (Commonwealth may not reopen its case when evidence is insufficient as matter of law).

Finally, the defendant was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments. The judge did not err by correcting her ruling in these circumstances.

[*172] b. Unlawful possession of a firearm (fourth offense). A jury-waived trial was held on the portion of the indictment which alleged that the defendant was a four-time offender of the firearms law. See *G. L. c. 269, § 10,d* **[***11]** . The defendant claims that the judge erred by relying on a Federal conviction for violating the "felon-in-possession" provisions of *18 U.S.C. § 922(g)(1)* as one of the three earlier firearms convictions.

Section 10(d) of c. 269 provides:

"Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished ... for a fourth such offense ...."

The defendant argues that the statute does not specifically permit convictions from other jurisdictions to serve as predicate offenses under *§ 10*(d) and that, in fact, only another conviction for a violation of *§ 10*(d) may be a "like offense." We disagree.

The language of *G. L. c. 269, § 10*(d), that conviction may be for a "like offense," does not prohibit Federal convictions from being used as predicate offenses. Contrast *Youngworth v. Commonwealth, 436 Mass. 608, 611-612, 766 N.E.2d 834 (2002)* (language in habitual offender statute requiring predicate convictions "in this or another state" precluded use of Federal **[***12]** conviction). Rather, the statute speaks of a "like offense."

We find no support for the defendant's claim that only another conviction for a violation of *§ 10*(d) may be a "like offense." Had the Legislature intended such a requirement, it would have expressly stated so. *Commonwealth v. Brown, 431 Mass. 772, 775, 730 N.E.2d 297 (2000).*

[984]** The statute does not define a "like offense." Where a statutory term is undefined, we may interpret it "in accordance with its generally accepted plain meaning." *Commonwealth v. Boucher, 438 Mass. 274,*

276, 780 N.E.2d 47 (2002). The generally accepted, plain meaning of "like," in this context, means "the same or nearly the same." Webster's Third New International Dictionary 1310 (1993). See *Commonwealth v. Corbett, 422 Mass. 391, 396, 663 N.E.2d 259 (1996)* (under plain and ordinary meaning of term "like offenses," prior convictions for operating under influence were **[*173]** "like offenses" even though prior offenses were misdemeanors and third offense was felony, where elements remained same).

Although the elements of the Federal statute are not identical to the State statute, the offenses proscribed **[***13]** by both statutes are sufficiently alike to be considered "like offenses" for purposes of *G. L. c. 269, § 10*(d). Both statutes are concerned with keeping firearms out of the hands of those not legally entitled to possess them, in particular, people with felony convictions. See *Huddleston v. United States, 415 U.S. 814, 824, 39 L. Ed. 2d 782, 94 S. Ct. 1262 (1974)*; *Barrett v. United States, 423 U.S. 212, 220, 46 L. Ed. 2d 450, 96 S. Ct. 498 (1976)*; *Commonwealth v. Moore, 54 Mass. App. Ct. 334, 344 n.8, 765 N.E.2d 268 (2002)* (intent of *G. L. c. 269, § 10*, is to protect public from potential danger incident to unlawful possession of such weapons). See also *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 805 n.8, 711 N.E.2d 589 (1999)* (concluding that two statutes "are like statutes in that similar public policy considerations underlie both statutes"). Cf. *Commonwealth v. Alvarez, 413 Mass. 224, 230 n.5, 596 N.E.2d 325 (1992)* (suggesting that *G. L. c. 94C, § 32J*, is "like" Federal and other State **[***14]** school zone statutes). The Federal conviction properly served as a predicate offense in these circumstances.

c. Peremptory challenges to three of the four white females. During jury selection, codefendant Brown's attorney challenged three of the four white female jurors. See *Commonwealth v. Jordan, 439 Mass. 47, 62, 785 N.E.2d 368 (2003)* (concluding that art. 12 of Massachusetts Declaration of Rights proscribes use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in group delineated by race and gender). The defendant did not object, but the prosecutor did. The prosecutor asked the judge to find that Brown's attorney had engaged in a pattern of discriminatory strikes. The judge declined, stating, "I'm not going to [address the issue] at this time."

Now the defendant claims that the judge failed to follow the procedural requirements articulated in *Commonwealth v. Burnett, 418 Mass. 769, 770-771, 642 N.E.2d 294 (1994)*. According to the defendant, the judge should have made an explicit finding regarding whether the required prima facie showing of impropriety had been made. *Id. at 771*. **[***15]** Although the judge did not follow the procedure established by the Supreme Judicial **[*174]** Court, procedural error is not a per se ground for reversal. *Commonwealth v. Calderon, 431 Mass. 21, 27, 725 N.E.2d 182 (2000)*. The defendant failed to object. If there was error, our review is limited to whether there exists a substantial risk of a miscarriage of justice. n6 **[**985]** *Commonwealth v. Randolph, 438 Mass. 290, 294, 780 N.E.2d 58 (2002)*. We conclude that the judge's statement constituted an implicit finding that no discriminatory pattern of peremptory challenges had been demonstrated. If the judge's finding is supported by the record, we afford it substantial deference. *Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638, 724 N.E.2d 332 (2000)*.

n6 We reject the defendant's attempt to derive a more favorable standard of review based on the Commonwealth's objection to the peremptory challenges. We also reject the defendant's attempt, based on the Commonwealth's unsuccessful objection at trial to Brown's exercise of her peremptory challenges, to preclude the Commonwealth from arguing on appeal that Brown's exercise of her peremptory challenges was proper. The defendant has not substantiated either argument with relevant authority. The defendant suggests that his counsel's failure to object constituted ineffective assistance of counsel. For purposes of this appeal, we equate the substantial risk standard and the ineffective assistance of counsel standard. *Commonwealth v. Randolph, 438 Mass. 290, 297, 780 N.E.2d 58 (2002)*.

[*16]**

There was no showing of gender-based strikes. After three women had been struck from the jury, two of the three women were replaced with women; therefore, the net effect was a reduction in the number of women on the jury by just one. See *Commonwealth v. Hyatt, 409 Mass. 689, 692, 568 N.E.2d 1148 (1991)* (where two white jurors were replaced with white jurors, there was no showing of race-based strikes); *Commonwealth v. LeClair, 429 Mass. 313, 320-321, 708 N.E.2d 107 (1999)* (judge acted within his discretion in finding no prima facie case of discriminatory challenges where replacement venire contained roughly equal numbers of men and women and prosecutor struck eight of eleven men and no women). In the present case, there were five women on the deliberating jury.

We are unable to discern from the record the race of the female jurors in the venire or on the deliberating jury. See *Commonwealth v. Arriaga, 438 Mass. 556, 571-572, 781 N.E.2d 1253 (2003)*. In these circumstances, where the record is silent as to the racial composition of the venire and the jury, we cannot conclude that the defendant has met his burden of overcoming **[***17]** the presumption that the peremptory challenges were proper. See *Commonwealth v. Burnett, 418 Mass. at 770* **[*175]** (presumption of correctness ordinarily attends exercise of peremptory challenges).

d. Prosecutorial misconduct. The defendant argues that errors made by the prosecutor established a pattern of intentional misconduct which infected the trial with prejudicial error. We have examined each claim and conclude that the allegations of prosecutorial misconduct are unwarranted.

i. The prosecutor's opening statement. Brown was tried with the defendant on charges of being an accessory after the fact. In his opening, the prosecutor explained to the jury the Commonwealth's theory of the case against both defendants. The prosecutor told the jury that the Commonwealth had to prove that Brown "did something to assist Mr. Smith in avoiding detection, capture, trial, or punishment. And in this case, it's the Commonwealth's allegation that she lied." The defendant moved for a mistrial, which was denied. The defendant argues that because the judge allowed the defendant's motion to sever Brown's perjury charge, the prosecutor should not have been permitted to state in opening **[***18]** that it was the Commonwealth's position that Brown lied to the police. n7

n7 Brown told the police that the defendant was outside the house in a car when Robinson was shot.

The statement was not improper. "Generally, a prosecutor in a criminal action may state anything in his opening **[**986]** argument that he expects to be able to prove by evidence." *Commonwealth v. Cohen, 412 Mass. 375, 382, 589 N.E.2d 289 (1992)*. This general rule also permits the prosecutor to state those facts which would have to be proved by inferences. *Commonwealth v. Johnson, 429 Mass. 745, 748, 711 N.E.2d 578 (1999)*. Whether Brown had lied was a central issue in the case, and relevant to the charge of accessory after the fact.

ii. Testimony of Detective Smith about the grand jury. During cross-examination, defense counsel elicited from Detective Smith that he

had gone to 33 Lawn Street to serve grand jury subpoenas although he had not attempted to interview Patrick Veridieu or Elaine Shaw. During redirect **[***19]** examination, the prosecutor asked Detective Smith whether Veridieu and Shaw had testified before the grand jury. Detective Smith answered that they had.

The defendant objected but the record does not establish the **[*176]** basis of the defendant's objection. An objection must be sufficient to make the grounds clear to the judge. See *Commonwealth v. Rivera, 425 Mass. 633, 636, 682 N.E.2d 636* & nn.1 & 2 (1997); *Commonwealth v. Houghtlin, 16 Mass. App. Ct. 691, 695, 454 N.E.2d 1289 (1983)*. Our review is limited, if there is error, to whether any error created a substantial risk of a miscarriage of justice.

The defendant argues that Detective Smith's testimony was hearsay because Detective Smith had no personal knowledge of whether either Veridieu or Shaw testified before the grand jury. The defendant further argues that such hearsay testimony impermissibly suggested that the prosecutor possessed information against the defendant which was not in evidence and that the erroneous admission of the testimony concerning Veridieu effectively left the defendant without a defense: that Veridieu was the shooter. See *Commonwealth v. Loguidice, 420 Mass. 453, 455, 650 N.E.2d 1254 (1995)*. **[***20]**

The defendant's challenge on grounds that the testimony was "hearsay" is not persuasive. The defendant's point appears to be that since Detective Smith could not be present in the grand jury room when Veridieu and Shaw appeared, he could only know whether Shaw and Veridieu testified based on the statements of another. The Commonwealth was entitled to rebut the inference suggested by the defendant that the police investigation was inadequate or that they had not diligently pursued the investigation. See *Commonwealth v. Carrion, 407 Mass. 263, 274-275, 552 N.E.2d 558 (1990)*. There was no error, but if there were it would not rise to the level of a substantial risk of a miscarriage of justice.

iii. References to the defendant's criminal history. The defendant claims that Detective Smith's reference to the defendant's photograph as being from a booking sheet and another witness's references to the defendant's photograph as a "mugshot" constituted prejudicial error and that the judge erred in not granting his motions for a mistrial. Instead, on each occasion, the judge promptly instructed the jury to disregard the reference. We conclude that the witnesses' missteps **[***21]** did not require a mistrial and that the judge's instructions to the jury to **[*177]** disregard the references were sufficient in these circumstances. n8 See **[**987]** *Commonwealth v. Robertson, 408 Mass. 747, 753, 563 N.E.2d 223 (1990)*; *Commonwealth v. Ellerbe, 430 Mass. 769, 781, 723 N.E.2d 977 (2000)*; *Commonwealth v. Lanning, 32 Mass. App. Ct. 279, 284, 589 N.E.2d 318 (1992)*. In addition, the judge twice instructed the jury to draw no inferences from the fact that the police had the defendant's photograph in their possession.

n8 The jury were aware that the witnesses were not shown the photographs until several weeks after the defendant had been arrested for the crime. Therefore, the fact that the defendant had been through the booking process or that "mugshots" of the defendant existed would not prejudice the defendant.

iv. Details about Robinson's injuries and recuperation and reference to his suffering. The defendant argues that introduction of evidence concerning the **[***22]** extent of Robinson's injuries and medical complications was substantially more unfairly prejudicial than probative and that the Commonwealth unnecessarily referred to Robinson's suffering

in closing argument. The defendant objected to the admission of the medical testimony, so we review to determine whether any error was prejudicial. The defendant did not, however, object to the admission of the medical records or to the closing argument, so our review is limited to whether any error created a substantial risk of a miscarriage of justice.

The Commonwealth argues that the judge did not err in admitting such evidence because the evidence was (1) probative of the defendant's intent to kill; (2) relevant because one of the defense theories was that Robinson had changed his story to conform to his injuries; and (3) relevant to establish Robinson's physical condition at the time he identified the defendant's photograph.

We agree that the testimony concerning the location of Robinson's wounds and the extensive organ damage he suffered was admissible because it was probative of the issue whether the assailant intended to kill Robinson. See *Commonwealth v. Gill, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798 (1994)*. **[***23]** The testimony concerning the subsequent treatment and medical complications, including life-threatening infections, was not relevant on this point. It was, however, relevant as it bore on Robinson's ability to communicate with the police and identify the defendant while in the hospital.

[*178] The extensive and detailed medical testimony concerning Robinson's need for a liver transplant to avoid death from complications due to the destruction of his digestive system stretched the limits of relevance. Any error in its admission was not prejudicial, however, as it was cumulative of the other properly admitted evidence of Robinson's injuries and treatment, including Robinson's appearance before the jury. *Commonwealth v. Moreschi, 38 Mass. App. Ct. 562, 566-567, 649 N.E.2d 1132 (1995)*.

The medical records were relevant because they assisted the jury in understanding the medical evidence. See *Commonwealth v. McDougal, 2 Mass. App. Ct. 820, 821, 309 N.E.2d 891 (1974)*; *Commonwealth v. Gill, 37 Mass. App. Ct. at 464*.

The reference in closing argument to Robinson's suffering was but one sentence in an otherwise proper argument. In the context of **[***24]** the entire argument, the defendant's concession that Robinson suffered egregiously, and the lack of an objection, the comment did not create a substantial risk of a miscarriage of justice. *Commonwealth v. Duguay, 430 Mass. 397, 403-404, 720 N.E.2d 458 (1999)*.

e. Alleged Bruton violations. The defendant claims that his confrontation rights were abridged by the introduction of certain statements of Brown, in violation of **[**988]** *Bruton v. United States, 391 U.S. 123, 137, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968)*. "According to Bruton, severance is constitutionally required where: a codefendant's extrajudicial statements are offered in evidence at a joint trial; the statements are 'clearly inadmissible' as against the defendant; the codefendant does not testify; and finally, there is a substantial possibility that, in determining the defendant's guilt, the jury relied on the codefendant's 'powerfully incriminating extrajudicial statements' notwithstanding any limiting instructions from the judge." *Commonwealth v. Adams, 416 Mass. 55, 58, 617 N.E.2d 594 (1993)*, quoting from *Commonwealth v. Pontes, 402 Mass. 311, 314, 522 N.E.2d 931 (1988)*. **[***25]**

Here, the defendant does not argue that his trial should have been severed from Brown's trial; rather, he argues that certain statements should not have been admitted. This is a difficult argument for the defendant as he pursued a trial strategy which depended on Brown's statements. In fact, he moved to sever only the perjury charge and stated that "Felicia Brown is [the **[*179]** defendant's] best defense." n9 The defendant did not object to the admission of most of the testimony concerning Brown's statements to Detective Smith or request a limiting instruction. "In

reviewing the defendant's conviction, we will 'not disregard the theory of law on which the parties proceeded at trial.'" *Commonwealth v. Silva, 431 Mass. 401, 405, 727 N.E.2d 1150 (2000)*, quoting from *Commonwealth v. Monteagudo, 427 Mass. 484, 487, 693 N.E.2d 1381 (1998)*. Considering the defendant's trial strategy, the jury's consideration of the hearsay testimony n10 did not create a substantial risk of a miscarriage of justice. n11 *Commonwealth v. Silva, 431 Mass. at 406.*

n9 For a discussion of some circumstances in which a defendant has waived his right to confront witnesses under the *Sixth Amendment to the United States Constitution*, see *United States v. Stephens, 609 F.2d 230, 232-233 (5th Cir. 1980)*; *Brown v. Artuz, 124 F.3d 73, 77 (2d Cir. 1997)*, cert. denied, *522 U.S. 1128, 140 L. Ed. 2d 135, 118 S. Ct. 1077 (1998)*; *United States v. Reveles, 190 F.3d 678, 683 (5th Cir. 1999)*; *United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999)*. **[***26]**

n10 The alleged hearsay statements are Brown's statement to police that she was under pressure; the prosecutor's reference in closing argument to Brown's grand jury testimony; and two witnesses' testimony of Brown's statements to them.

n11 The standard of review is substantial risk of a miscarriage of justice because the defendant either did not object below to the testimony being admitted or, when an objection was raised, did not state any constitutional grounds. See *Commonwealth v. Fowler, 431 Mass. 30, 41 n.19, 725 N.E.2d 199 (2000)*.

In looking at each statement, we hold that no error occurred, although for varying reasons dependent upon the statement. See *Commonwealth v. Devlin, 365 Mass. 149, 159, 310 N.E.2d 353 (1974)* (statement admissible against defendant as statement of joint venturer); *Commonwealth v. Yesilciman, 406 Mass. 736, 746, 550 N.E.2d 378 (1990)* (remarks made during closing argument are viewed in context of entire argument and in light of judge's instructions to jury and evidence at trial); *Commonwealth v. Ivy, 55 Mass. App. Ct. 851, 857-858, 774 N.E.2d 1100 (2002)* **[***27]** (to exclude such probative statements under strictures of *confrontation clause of Sixth Amendment to United States Constitution* would be height of wrongheadedness, given that confrontation clause has as basic purpose promotion of integrity of fact-finding process). See also *Bruton v. United States, 391 U.S. at 135* (statement not "powerfully incriminating extrajudicial statement[]").

[989]** f. Cumulative error. The defendant argues that the alleged errors **[*180]** created a "cumulative" effect requiring reversal. See *Commonwealth v. Smith, 387 Mass. 900, 912, 444 N.E.2d 374 (1983)*. As we have concluded that the one error (in the admission of medical testimony regarding Robinson's need for a liver transplant) did not prejudice the defendant, we reject the defendant's claim.

Judgments affirmed.

Order denying motion for a new trial affirmed.

11/13/98 - Hearing re: Reconsideration of defendant's motion for Required Finding of Not Guilty After Hearing, Taken under Advisement Donovan, RAJ
Attest: Marybeth Brady Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT
NO. 98 - 11521

11-18-98 Reconsideration denied Donovan, RAJ

COMMONWEALTH

V.

MELVIN SMITH

MOTION FOR REQUIRED FINDING

Now comes the defendant in the above - entitled matter, Melvin Smith, and moves this Honorable Court to order a finding of not guilty to enter on this indictment.

The defendant moves for a required finding on two grounds. First, the Commonwealth has not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime. See Commonwealth v. Hamilton, 426 Mass. 67(1997), and Commonwealth v. DeJesus, 44 Mass. App. Ct. 349(1998). In accord, Commonwealth v. Muse, 35 Mass. App. Ct. 466. In the DeJesus case the only evidence offered regarding the firearm was the victim's statement that the firearm was a shotgun. In order for the statute to apply there needed to be evidence presented that the length of the barrel was "less than eighteen inches". When no such evidence is produced it is error to deny the defendant's Motion for Required Finding.

In the case now before the court, the only evidence regarding the firearm was Mr. Robinson's testimony that he observed a .32 caliber revolver in Mr. Smith's hand. No further description was given of the gun, not even whether the barrel was long or short. Under these circumstances the defendant is entitled to a required finding of not guilty as to this indictment.

11/12/98 - Filed and after hearing. Allowed
Donovan, J.
Attest: Marybeth Brady Assistant Clerk

11/12/98 - After reconsideration, defendant's Motion for Required Finding is Denied
Donovan, J.
Attest: Marybeth Brady Assistant Clerk

The second basis for the Motion For Required Finding is that the defendant is charged with a violation of G. L. c269, section 10(a), possession of a firearm, not at home or work. The evidence in this case does not show the defendant is not entitled to the exemption provided by G.L. c269, section 10(h), in that the testimony supports one of two propositions, either of which results in the entry of a not guilty finding as Mr. Smith was 'at home' at the time of the alleged violation.

Mr. Robinson testified that Mr. Smith was 'staying' at 33 Lawn Street, third apartment, at the time of the shooting. When Mr. Robinson was asked who was staying at that address during the time he was staying there, he listed the following people: Romanis Charles, himself, Felicia Brown and Melvin Smith. If in fact Mr. Smith was staying at 33 Lawn Street, then he was at home at the time of the alleged possession and is entitled to a not guilty finding. Even if the stay was temporary, Mr. Smith is entitled to the same outcome. In cases such as Commonwealth v. Brass, 42 Mass. App. Ct. 88(1997), it has been the suggestion of the appellate courts that a temporary visitor is still entitled to the rights and privileges of calling his temporary shelter his home. The United States Supreme Court and the Supreme Judicial Court have held that a hotel guest has a reasonable expectation of privacy during the time of his authorized occupancy. See Stoner v. California, 376 U.S. 483(1964), and Commonwealth v. Paszko, 391 Mass. 164(1984).

If Mr. Smith is not entitled to the 'at home' exception suggested by Mr. Robinson's testimony that Mr. Smith was staying at that location, then Mr. Smith is entitled to a finding of not guilty on the basis of being a guest in the home of Felicia Brown. The evidence in the case is clear that Mr. Smith was on the premises legally and with the consent, and at the invitation of Ms. Brown. He is, at worst, her guest. Ms. Brown could not be found guilty of a violation of section 10(a) for the actions attributed to Mr. Smith. As Ms. Brown's guest, neither should Mr. Smith. Just as hotel guests are given constitutional rights while they are lawfully on the premises, so too should a

guest be afforded the same protections as the resident of a home. In G.L. c278, section 8A(the so-called 'castle' statute), the legislature set out an exception to the flight rule before defending oneself. It gives the resident a defense if the "...occupant was in his dwelling at the time of the offense." It is unimaginable that the legislature did not intend a resident's legitimate guest in the dwelling to have the same protection and the same defense. So too should a lawful guest have the same rights and protections as the resident under the statutory scheme contained in G.L. c269, section 10(a), and 10(h). It would be anomalous for the legislature to criminalize the conduct of a guest in possession of a homeowner's firearm when the host's identical conduct would not be criminal, or subject to the same punishment.

For the foregoing reasons, the defendant's Motion For Required Finding should be allowed.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 96 SUCR 11471
98 SUCR 11521

COMMONWEALTH OF MASSACHUSETTS

vs.

MELVIN T. SMITH

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

INTRODUCTION

Defendant Melvin T. Smith ("Smith"), convicted on charges of assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm (fourth offense), has filed the instant motion for a new trial pursuant to Mass.R.Crim.P. 30(b). Smith, through counsel, asserts that the trial judge committed eight separate errors which necessitate a new trial.

For the reasons set forth below, the defendant's motion for a new trial is **DENIED**.

BACKGROUND

On November 16, 1998, a Suffolk Count jury convicted Melvin T. Smith of armed assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm. G.L. c. 268, § 10. Subsequent to the convictions, the court proceeded to trial on the second

and subsequent portion of the unlawful possession of a firearm indictment. Following the jury-waived trial, the court convicted Smith of a fourth offense of unlawful possession of a firearm. G.L. c. 269, § 10(d). It is from these convictions that Smith has filed his motion for a new trial. Mass.R.Crim.P. 30(b).

The victim in the instant case, Christopher Robinson ("Robinson"), was the first cousin of Felicia Brown ("Brown"), the then-girlfriend of Smith. Brown and Robinson were close, and often visited each other. In August 1996, Brown's mother traveled out of town for two weeks and allowed Robinson to stay with Brown at her house while she was away.

It was during this time that Robinson became acquainted with Smith. The two men allegedly had a friendly relationship and often spoke. On August 15, 1996, Robinson had spent the day drinking. Over the course of twelve hours, he had consumed a fifth of vodka and at least forty ounces of beer. Later that same day, Robinson, Brown, and Smith all ate dinner together. There was no evidence of any malevolent behavior by any one party against any other.

At approximately 4 a.m., Robinson walked downstairs. When he reached the bottom of the staircase, he saw Smith and Brown in Brown's bedroom. Smith, according to Robinson, was holding "a pistol," which appeared to be either "a .32 or a .38." Smith fired the gun, hitting Robinson three times. Smith then turned to Brown and said, "let's go," in an effort to leave the house. Robinson then said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. You[r] name is Melvin." Robinson stated that Brown said, "His last name is Smith." Brown and Smith left the house, while Brown's step-father, who had heard the three shots, called

for assistance.

Boston Police Officer Wayne Clark ("Clark") responded to the 911 call. When Clark asked Robinson who had shot him, Robinson responded, "Melvin." When Clark asked for Melvin's last name, Robinson stated that he did not know it. Robinson did tell Clark that Melvin was Brown's boyfriend.

Robinson was transported to Brigham & Women's Hospital, where he underwent surgery. By September 7, 1996, Robinson was still on a ventilator, but was able to communicate non-verbally. Robinson was asked by a Boston detective to look at a photo array and identify the person who shot him. Robinson was able to identify Smith.

Robinson testified at Smith's trial. Following Smith's convictions, Robinson died due to liver damage that resulted from the gun shot wounds. Subsequently, a Suffolk Count Grand Jury indicted Smith on murder charges. That trial has yet to occur.

DISCUSSION

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass.R.Crim.P. 30(b). A motion for a new trial is addressed to the sound discretion of the judge, and the judge's disposition of the motion will not be reversed unless it is manifestly unjust or unless the trial was infected with prejudicial constitutional error. See Commonwealth v. Moore, 408 Mass. 117, 125 (1990) (internal citations omitted).

In the instant case, Smith raises eight issues in which he alleges error. Specifically, Smith contends that: (1) Smith's joint trial with non-testifying co-defendant Brown deprived Smith of his constitutional right to confront and cross-examine his

accusers, particularly where Robinson testified to a statement of Brown's which identified Smith as the shooter; (2) Brown presented an antagonistic defense whereby, at the last minute, she accused Smith of being the shooter and of menacing Brown into covering for him; (3) Smith was deprived of his constitutional right to counsel where the trial judge answered nine questions from the jury without first giving counsel an opportunity to be heard; (4) Smith was placed in double jeopardy where the trial judge allowed Smith's motion for a required finding of not guilty on the possession of a firearm indictment at the close of the Commonwealth's case, but then "reinstated" the charge after Smith had rested; (5) Smith was deprived of his right to an impartial jury when counsel for Brown exercised peremptory challenges in a discriminatory manner; (6) the jury was erroneously instructed on excessive force in self-defense because the instruction misplaced the burden of proof; (7) Smith was deprived of his due process rights where his conviction for possession of a firearm (fourth offense) rested on insufficient evidence; and (8) Smith was deprived of a fair trial where a crucial witness to the identification issue gave trial testimony which was materially different from her voir dire testimony.

At trial, counsel for Smith objected and preserved for appeal only two of the aforementioned issues; issues four and eight. Therefore, this memorandum addresses the merits of only Smith's double jeopardy argument and Smith's contention that a crucial identification witness gave trial testimony that was materially different from her voir dire testimony. Issues one, two, three, five, six, and seven were not objected to at trial, are deemed waived, and this court expressly declines to resurrect them. See Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 230-231 (1993) (no resurrection

where trial judge expressly stated he was not addressing certain issues in motion for new trial where issues could have been raised either at trial or in direct appeal).

I. "Reversal" of the Allowance of Smith's Motion for Required Finding of Not Guilty on the Firearms Offense.

Smith contends that the court erred in "reversing" its allowance of the defendant's motion for a required finding of not guilty on the firearms offense. During trial, after the Commonwealth had completed its case, the court allowed Smith's motion for a required finding of not guilty on the firearms charge. However, after the defendant's case, the court, relying on Commonwealth v. Sperrazza, 372 Mass. 667 (1977), withdrew its allowance of Smith's motion and allowed the firearms charge to go to the jury.[1] Smith was subsequently convicted on the charge. In seeking a new trial, Smith contends that the court's allowance, and then subsequent withdrawal of the allowance, placed Smith in double jeopardy, in violation of Smith's constitutional rights. There was no error.

A criminal defendant has a constitutional right not to be placed in jeopardy twice for the same offense. Commonwealth v. Lowder, 432 Mass. 92, 103 (2000). When a defendant has been put in jeopardy for an offense and acquitted, he may not be retried for that offense. Id. The defendant, relying on the above-stated rule, contends that the

[1] At issue in Smith's trial with respect to the firearms charge was the length of the weapon's barrel. The Commonwealth was required to prove that the barrel was less than sixteen inches. G.L. c. 269, § 10(a); G.L. c. 140, § 121. At trial, Robinson testified that the weapon was "a pistol," and "a .32 or a .38." In Commonwealth v. Sperrazza, 372 Mass. 667 (1977), which the court finds apposite in this case, the Supreme Judicial Court held that a jury may infer that a barrel was less than sixteen inches where there was testimony that the gun was a "revolver" or a "handgun" even though no evidence as to the barrel's length was presented.

allowance of the motion, and then the subsequent withdrawal of it later in the trial, placed him in double jeopardy because upon the court's allowance of the motion, jeopardy terminated as to that charge. See Lowder, 432 Mass. at 103. At first blush, Smith's argument appears to have merit, but crumbles when viewed with an eye towards the policy reasons behind double jeopardy.

The United States Supreme Court traced the development of the double jeopardy clause in the constitution, and noted that "[a]t the heart of the policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 568-569 (1977). The clause, the Court held, was enacted so that the State may not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense, and causing him to live in a state of anxiety and insecurity, all the while wondering if he may be found guilty or innocent. Id. at 569. However, where there are no threats of successive prosecution, the double jeopardy clause is not offended. Id. at 569-570.

The instant case is, in principle, analogous to the situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal. In such a case, an appeal by the government is permitted because a conclusion by an appellate court that the judgment of acquittal was improper does not require the defendant to submit to a second trial; the error can be corrected on remand by the entry of judgment on the verdict. See United States v. Jenkins, 420 U.S. 358, 365 (1975), *overruled on other grounds*, United States v. Scott, 437 U.S. 82 (1978); Commonwealth v. Elder, 389 Mass. 743, 749 (1983). In the instant case, Smith was not, and would not have been,

required to submit himself to a second trial. The erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and Smith's counsel had the option to seek a re-opening of the evidence. Smith's counsel did not do so, and it is unlikely he could have produced evidence disputing the length of the firearm used in the shooting because any evidence with respect to Smith's knowledge of the firearm's length would be an implicit admission that he used and/or possessed the weapon.[2]

Although no reported Massachusetts case reflects the facts herein, an analogous decision supporting the Commonwealth's contention that the double jeopardy clause did not bar the submission to the jury of the firearms offense is Commonwealth v. Ierardi, 17 Mass. App. Ct. 297 (1983). In that case, after the defendant was found guilty of the substantive portions of a firearms offense, the Commonwealth introduced evidence of prior convictions in an effort to prove that it was the defendant's third such offense. The defendant moved for a required finding of not guilty, and the trial judge allowed the motion because the Commonwealth had failed to establish that the defendant was the same person named in the prior two convictions. Id. at 303. The Commonwealth then

[2] Indeed, a trial judge has discretion to re-open evidence when mere inadvertence or some other compelling circumstance... justifies a re-opening and no substantial prejudice will occur. Commonwealth v. Cote, 15 Mass. App. Ct. 229, 241 (1983). In Cote, the trial judge allowed the re-opening of the Commonwealth's case after it rested, and after the defendant had moved for a required finding of not guilty. Id. at 238-240. The Appeals Court held that in so doing, the trial judge did not commit error because the failure to provide evidence with respect to a particular issue stemmed from a good faith, albeit erroneous, belief by the Commonwealth that a particular burden of proof rested with the defendant, and by allowing the Commonwealth to put on evidence to establish what it was required to prove did not prejudice the defendant. Id. at 242-243. Similarly, as noted above, in this case, Smith suffered no prejudice by the court's "reversal" of its allowance of a required finding of not guilty.

moved to re-open its case, informing the judge that it had intended to call the defendant's counsel on the two prior convictions as a witness to establish the necessary identification but had not done so because current defense counsel had agreed to stipulate to identity. Defense counsel acknowledged the stipulation, and the judge allowed the Commonwealth to re-open its case to admit the stipulation. The Appeals Court held, without elaborating, that on those facts there was no violation of the defendant's right not to be put twice in jeopardy. Id.

Smith's reliance on Lowder, 432 Mass. 92, and Commonwealth v. Super, 431 Mass. 492 (2000), is misplaced because in those cases, dismissal on double jeopardy grounds was upheld because retrial of the defendant would have required the empaneling of a second jury. In this case, where Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed, Smith was not placed in double jeopardy in violation of his constitutional rights.

II. The Identification Witness' Trial Testimony

Smith contends that an unfair surprise occurred because Nurse Diane Tavares ("Tavares"), one of Robinson's hospital caretakers, changed her testimony with respect to Robinson's hospital room identification of Smith, and that the Commonwealth knew about the testimony and failed to disclose it. The Commonwealth, however, contends that Tavares' testimony did not change, and this court agrees.

During the voir dire, Tavares testified with respect to Robinson's ability to identify the shooter based on the photo array presented to Robinson by the Boston police. Tavares testified that Robinson "was able to physically point with a hand." She further

stated that "[Robinson] just pointed [to the pictures] with his finger," and that he was capable of holding a marker, but was not holding one.

At trial, Tavares testified that Robinson, due to a condition known as "wrist drop," was unable to grasp with "fine motor movement" and, thus, could not write. She testified, however, that while the condition did not prevent him from pointing to words on a communication board, it did prevent him from writing. On cross-examination, Tavares testified that Robinson was capable of holding a marker, but could not write. She stated, "[h]e could hold it, but he couldn't – he can't write. He couldn't write with it, he could hold it." Tavares further noted that Robinson could have drawn a "very big" circle, had he been holding a marker.

Thus, at both the voir dire and trial, Tavares testified that Robinson could hold a marker, but that he could not write with it.[3] Smith's assertion of unfair surprise fails because Tavares' testimony did not change, and Smith's motion for a new trial on this point, and his motion for an evidentiary hearing, is denied.

[3] This court fails to see how the inability to hold a marker would have cast doubt on Robinson's photo identification of Smith. The evidence at trial was that Robinson identified Smith by pointing with his finger, not by using a marker. In any event, the ability to write and the ability to draw a "very big" circle are separate skills and are not inconsistent.

ORDER

Accordingly, it is **ORDERED** that the defendant's motion for a new trial is **DENIED**.

Elizabeth Bowen Donovan
Justice of the Superior Court

DATED: June 25, 2001

COMMONWEALTH vs. MELVIN T. SMITH

[NO NUMBER IN ORIGINAL]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

440 Mass. 1104; 797 N.E.2d 380; 2003 Mass. LEXIS 804

October 3, 2003, Decided

PRIOR HISTORY: [*1] Reported below: 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003).

Commonwealth v. Smith, 58 Mass. App. Ct. 166, 788 N.E.2d 977, 2003 Mass. App. LEXIS 578 (2003).

OPINION: *Further appellate review denied.*